



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2004

Carey Smith
General Counsel
Texas Department of Human Services
P. O. Box 149030
Austin, Texas 78714-9030

OR2004-1203

Dear Carey Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196065.

The Department of Human Services (the "department") received a request for records of complaints or investigations conducted on the Palliative Hospice Center and a specified nurse. You state that some of the requested information will be released to the requestor. You also state that the department will withhold some responsive information from the requestor pursuant to the previous determination issued to the department in Open Records Letter No. 2001-5348 (2001). *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 at 6-9 (2001) (delineating instances in which attorney general decision constitutes previous determination under section 552.301). You claim that portions of the remaining requested information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You claim that certain information that is contained within the submitted Statements of Licensing Violations and Plans of Correction forms (the "state forms") is confidential under federal law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that the Health

Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs some of the submitted information.

At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the "Act"). Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies. Because you claim no other exception with respect to the months and days that you have marked in conjunction with HIPAA, we conclude this information may not be withheld under section 552.101 and must be released.

We turn now to your arguments for the remaining information. You assert that certain identified portions of the submitted information constitute medical records subject to the Medical Practices Act ("MPA"). *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Based on your representations and our review of the information at issue, we agree that the portions of the submitted records that you have marked pursuant to the MPA constitute information taken from medical records and are therefore subject to the MPA. This information may be released only in accordance with the MPA.

You also contend that certain identifying information must be withheld under section 552.101 because it is confidential under section 142.009(d) of the Health and Safety Code. Section 142.009(d)(5) states that "reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except . . . on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency." Health & Safety Code § 142.009(d)(5).

You acknowledge that section 142.009(d)(5) requires the department to release the submitted state forms. You claim, however, that this provision dictates that the department withhold the identifying information that you have marked in the state forms. You inform us that the information you have marked pursuant to section 142.009(d)(5) relates to agency representatives who are not the owners of the agency. After reviewing your arguments and the submitted information, we agree that the identifying information you have marked is confidential under section 142.009(d). *See* Health & Safety Code § 142.001(12) (defining "home and community support services agency"). Therefore, pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code, you must withhold the identifying information that you have marked in the state forms.

You also assert that the unsigned CMS 2567 form must be withheld in its entirety under section 142.009(d) of the Health and Safety Code. Federal regulations require the department to release *completed* CMS 2567 forms containing a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 U.S.C. 1306(e), (f); 42 C.F.R. § § 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). In this case, you state that the CMS 2567 form you have marked does not contain the

signature of the agency's representative or any comments provided by the agency. You further state that the department's records "indicate that the department did not send this form to the home health agency for review and comments," and that the "department has no evidence that the investigated agency has had a reasonable opportunity to review this federal report," or any evidence that the federal and state conditions that would authorize the department to publicly release this form have been met. Thus, after reviewing your arguments and the information at issue, we conclude that the department must withhold the unsigned CMS 2567 form in its entirety pursuant to section 552.101 in conjunction with section 142.009(d) of the Health and Safety Code.

Next, you raise section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resources Code for portions of the submitted information. Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information* concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. § 431.300 et seq.; Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

You have marked the information that you claim is made confidential under sections 12.003 and 21.012 of the Human Resources Code. You inform us that this information relates to clients of the department who are Medicaid recipients or have been determined to be financially eligible for the assistance programs to which the submitted client information pertains. You also inform us that in this instance the release of the information in question would not be for a purpose directly connected with the administration of the programs to

which the information pertains. Based on your representations and our review of the information at issue, we conclude that the information that you have marked is confidential under section 12.003 of the Human Resources Code. Therefore, the department must withhold that information under section 552.101 of the Government Code as information made confidential by law.

In summary, we conclude that the portions of the submitted records that you have marked pursuant to the MPA constitute information taken from medical records and therefore may be released only in accordance with the MPA. We also conclude that, pursuant to section 552.101 of the Government Code and section 142.009(d)(5) of the Health and Safety Code, the department must withhold the identifying information that you have marked in the state forms. The department must withhold the unsigned CMS 2567 form in its entirety pursuant to section 552.101 in conjunction with section 142.009(d) of the Health and Safety Code. Finally, the department must withhold the client information you have marked pursuant to section 552.101 in conjunction with section 12.003 of the Human Resources Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah I. Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 196065

Enc. Submitted documents

c: Mr. Felix M. Tormos
1401 West Bond Street
Denison, Texas 75020
(w/o enclosures)